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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 7

STATE OF MINNESOTA, PETITIONER,

vs.

GEORGE BLASIUS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of the State of Minnesota appears in 187 Minn. 420, 245 N. W. 612, and is set forth verbatim in the Record at page 22.

II.

Jurisdiction.

1. The appellate and supervisory jurisdiction of the Supreme Court of the United States is invoked under Sec-

tion 237 (b), Judicial Code of the United States (28) U. S. C. A., Sec. 344 (b), to correct error of the Supreme Court of the State of Minnesota in the case cited in the last preceding paragraph.

2. Final judgment of the Supreme Court of the State of Minnesota herein was entered on the 3rd day of January, 1933 (R. 28).

3. The case at bar comes within the appellate jurisdiction of this Court under Section 237 (b) of the Judicial Code by reason of the respondent's claim that the cattle in question were exempt from local taxation as being in the current of interstate commerce (R. 3), thus drawing in question the rights, privileges and immunities of said respondent under the Federal Constitution and Laws. The trial court held that the cattle had sufficiently come to rest to take them out of the current of interstate commerce and subject them to local taxation (R. 19). The Supreme Court of the State of Minnesota held that the trial court erred in so holding and reversed judgment of the trial court (R. 22).

Although no decisions have been found to directly support the appellate and supervisory jurisdiction of this Court under the above section of the Judicial Code, the language of the section clearly seems broad enough to support jurisdiction.

See U. S. Code Annotated, Sec. 344—Footnote 241. The section reads as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege or immunity is specially set up or claimed

by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

III.

Statement of Case.

This was an action brought by your petitioner to enforce collection of delinquent personal property taxes levied upon eleven head of cattle owned by the respondent. The cattle in question, coming from points either without or within the State, were consigned to the South Saint Paul, Minnesota, stockyards for sale (R. 6). Respondent, engaged in the business of a dealer in livestock at said stockyards (R. 5), bought said cattle after they were unloaded in the stockyards and put up for sale, and placed them in pens leased by him from the Stockyards Company (R. 17). At the opening of business on May 1, 1929, when the cattle were assessed for taxation, they were owned by the respondent, had not been entered with any common carrier for shipment to any point (R. 7), no contract for sale or any other arrangement for sale or shipment had been made, and their final destination was unknown. Respondent sold seven of the eleven head of cattle in question on May 1, and the other four head on the next succeeding day, May 2 (R. 7-8). These sales were made to third parties, who in turn shipped the cattle to points outside the State (R.7-8).

The trial court originally made findings disallowing the tax on the cattle (R. 10). Petitioner's subsequent motion to amend the findings was granted, and the court thereupon held the cattle taxable (R. 14). From judgment entered pursuant to these findings (R. 21), respondent appealed to the Supreme Court of the State of Minnesota,

which reversed the trial court and held that the cattle were not taxable as being in interstate commerce (R. 22-28).

IV.

Specifications of Error.

1. The Supreme Court of the State of Minnesota erred in reversing the judgment of the trial court.

2. The Supreme Court of the State of Minnesota erred in holding that the cattle in question had not sufficiently come to rest at the time of the tax levy to break the continuity of their interstate journey and subject them to the taxing power of the State of Minnesota.

3. The Supreme Court of the State of Minnesota erred in applying the rule laid down by those cases involving the power of the Federal Government over interstate commerce, to the case at bar, which involves the limit of the State's power over commerce among the States.

4. The Supreme Court of the State of Minnesota erred in holding that the cattle in question were not taxable, even assuming that they were in interstate commerce at the time of the tax levy.

V.

ARGUMENT.

Summary of Argument.

Your petitioner contends that the tax involved in the case at bar was valid, and that the final judgment of the Supreme Court of the State of Minnesota, in reversing the judgment of the lower court sustaining the tax, is erroneous for the following reasons:

A. The cattle in question had sufficiently come to rest at the time of the tax levy to break the continuity of their

interstate journey and subject them to the taxing power of the State of Minnesota.

B. The rule laid down by the cases involving the power of the Federal Government over interstate commerce is not applicable to the case at bar, which involves the limit of the State's power over commerce among the States.

C. Even assuming that the cattle were in interstate commerce at the time of the tax levy, the tax was valid, since it was so indirect as not to amount to a regulation of interstate commerce.

Point A.

(Assignment of Errors 1 and 2.)

The cattle in question had sufficiently come to rest at the time of the tax levy to break the continuity of their interstate journey and subject them to the taxing power of the State of Minnesota.

The general rules relating to the local taxation of property which has temporarily come to rest are set forth in the following statements from the authorities:

> "The general rule is that property temporarily at rest is taxable, as where the transit has been interrupted and the property is held in storage or at distributing points to be delivered to buyers or reshipped to other places. Merchandise may cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination, and if kept at such point for the use and profit of the owners and under the protection of the laws of the state, it becomes subject to the taxing power of the state."
>
> 1 *Cooley, Taxation* (4 ed.), Section 383.

> "The weight of authority, as found in later cases, is to the effect that, to entitle an article of commerce to be exempt from state taxation, there must be a con-

tinuous movement of it in interstate commerce, and that it may be taxed by the state when it is held at storage or distributing points, with the intention of delivering it to buyers or of transshipping to other points."

12 *C. J., Commerce,* Section 128.

"From the time of delivery of property to a common carrier for interstate transportation, until delivery to the consignee, the federal protection continues only while the goods are in actual transit, consequently, if property is detained for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it is not during that time the subject of interstate commerce but is subject to the operation of state laws."

5 *R. C. L., Commerce,* Section 19.

Whether in a given case commodities moving in interstate commerce are subject to local taxation at the point of interruption must be determined from the character of the interruption and the circumstances surrounding the interruption.

Hughes Bros. Timber Co. v. *Minnesota* (1926), 272 U. S. 469, 71 L. Ed. 359.

Missouri Pac. R. Co. v. *Schnipper* (1931), 51 F., Second Series, 749.

In the following cases the passage of commodities from point of origin to final destination was interrupted under circumstances held by the courts to have broken their continuity in transit so as to subject them to local taxation at the point of interruption:

In the case of *Brown* v. *Houston* (1885), 114 U. S. 622, 29 L. Ed. 257, it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, became intermingled, on arrival there, with the general property in

the State of Louisiana, and was subject to taxation under general laws of that State, although it might be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port.

In *Pittsburgh and Southern Coal Company* v. *Bates* (1895), 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538, it was held that coal, shipped by the owners at Pittsburgh in their own barges to Baton Rouge for the purpose of being sold there or sent thence to supply orders, and moored at Baton Rouge in the original barges in which it was shipped at Pittsburgh, is subject to local taxation there as a stock in trade, and such imposition of a tax violates no provision of the Constitution of the United States.

In *Diamond Match Company* v. *Ontonagon* (1903), 188 U. S. 82, 23 S. Ct. 266, 47 L. Ed. 394, logs floated by owner down the Ontonagon River and its tributaries to booms at its mouth at the village of Ontonagon, Michigan, there to be loaded on cars for transportation by railway to the owner's mills at Green Bay, Wisconsin, were held to be liable for taxation at Ontonagon, in view of the evidence that this place was used by the owner as assorting grounds and to hold the logs until such times as they were needed to keep the mills supplied to capacity in Green Bay.

In the case of *American Steel and Wire Co.* v. *Speed* (1904), 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538, the court held that goods brought in original packages from another state, after they have arrived at their destination and are at rest within the state, and are enjoying the protection which the laws of the state afford, may, without violating the commerce clause of the Constitution, be taxed without discrimination like other property within the state, although at the time they are stored at a distributing point from

which they are subsequently to be delivered in the same packages, through the storage company to purchasers in various states.

As is pointed out in the case of *Missouri Pac. R. Co.* v. *Schnipper*, supra, the court recognized that the goods in the hands of the storage company in the original packages may not have entirely lost their character as subjects of interstate commerce, but held, nevertheless, that they were taxable in view of the circumstances shown by the evidence.

In the case of *General Oil Co.* v. *Crain* (1908), 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, the facts were as follows:

A Tennessee corporation shipped oil from Pennsylvania and Ohio, to Memphis, Tennessee. The oil was shipped in tank cars. At Memphis it was transferred to large tanks. The sole purpose of this transfer was to place the oil in smaller vessels in order to better meet the requirements of orders further west. The oil was kept in the large tanks at most only a few days. While there an inspection fee was charged. Under these facts, the court held that the oil at the time it was stored in the tanks at Memphis, Tennessee, was taxable and, therefore, sustained the imposition of the inspection fee.

The Supreme Court of the State of Minnesota in its opinion in the case at bar stated that the Crain case, while not specifically overruled, is no longer considered to be of controlling weight, and that there has since been a liberal construction of what is continuity of the interstate journey. In support of this statement the court cited the case of *Carson Petroleum Co.* v. *Vial* (1929), 279 U. S. 95, 49 Sup. Ct. 292, 73 L. Ed. 626. The facts of that case show that orders for the oil had already been filled and that the oil was stored only to await vessels to take it to foreign ports, or to accumulate enough oil to fill a ship. This manifestly was not a break in the continuity of the journey. It was

but a delay in the continuity of movement incidental to that journey—a necessary means of securing prompt transshipment. *Only the mechanics of transportation were involved.* As pointed out above, the shipment in the Crain case was brought to rest for the convenience and advantage of the owner. See *Gulf Refining Co.* v. *Phillips* (1926), 11 F. (2d) 967.

In the case of *Bacon* v. *Illinois* (1913), 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, it was held that where grain was unloaded for weighing, cleaning, inspection, etc., it lost its immunity from local taxation, even though the intention of the shipper was to send it on immediately thereafter in accordance with the original contract of transportation. In this case the court said:

> "But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation."

In *Susquehanna Coal Company* v. *South Amboy* (1913), 228 U. S. 665, 33 S. Ct. 712, 57 L. Ed. 1015, coal shipped from Pennsylvania to South Amboy, New Jersey, and intended for further shipment to ports in other states or countries, but not definitely determined, and stored while awaiting orders or means of transportation for orders already received was held subject to taxation by the municipality within whose jurisdiction it was stored because the interruption was not only an incident of or in furtherance of the transportation, but also served other beneficial purposes of the owner. The court said:

> "There was something more than the submission to delay in transportation and the acceptance of its consequences. This situation was made a facility of business, a business conducted through agents and employes. And, it will be observed, there was valuable property kept in the State represented by the coal, varying in quantity from 10,000 tons to 150,000 tons. There was something more, therefore, than an incidental interruption of the continuity of its journey through the State. The coal, therefore, was not in actual movement through the State; it was at rest in the State, and was to be handled and distributed from there. Therefore, the principles expressed in *General Oil Co.* v. *Crain*, 209 U. S. 211, and *Bacon* v. *Illinois*, 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the States where stored; the delay there was to be temporary, a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the State."

In the case of *Myers* v. *Baltimore County* (1896), 83 Md. 385, 35 Atl. 144, in which the plaintiffs, cattle dealers officing

at Baltimore stockyards, bought cattle after they came to the stockyards from the western states and shipped at least two-thirds of them to buyers in other states, the cattle rarely remaining in the stockyards for more than a day, the court held that these cattle were subject to local taxation. In upholding the tax, the court said:

> "We cannot hold in this case that at the period of assessment any of these cattle were in the course of transportation. In the regular course of business the cattle purchased by the appellants are shipped to themselves in Baltimore, to be there disposed of as they may deem most advantageous to their own interests. *Once at the Union Stockyards, the transportation ceases, until, at the pleasure of the appellants, they are again shipped. They are not held there to await a steamer or a train, but for the convenience of the owners, in order that they may determine which of them they will sell in the home market and which they will ship to the foreign, or any other disposition they may choose.* * * * The property, then, not being in transit either through the state, or from a point in the state to a point outside, is 'property within the state', within the meaning of the statute." (Italics ours.)

See also *State* v. *Burlington Lumber Co.* (1912), 118 Minn. 329, 136 N. W. 1033, where the court, in sustaining a tax on logs which had been stopped at a boom, there to be assembled for shipment out of the State, said:

> "It is sufficient to say that the boom of the St. Paul Boom Co. appears to have been the place of assembling the logs, for their final preparation for shipment, *as distinguished from a mere way or transfer station on a continuous, unbroken journey;* and such being the case, it must be held that the interstate transit did not begin until the deliveries to the steamer on May 2 and 6, respectively." (Italics ours.)

In the case of *Missouri Pac. R. Co.* v. *Schnipper, supra,* the court held that railroad ties originally interstate ship-

ment but temporarily in Illinois under privilege of stop-over for creosoting at a creosoting plant were temporarily withdrawn from interstate transportation while at said plant and therefore subject to general property tax in Illinois.

In the following cases it was held that under the circumstances the intermediate interruption and consequent delay in the interstate journey would not render the shipment liable to local taxation at the point of interruption.

In the case of *Coe* v. *Errol* (1886), 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, the court held that logs which were cut in New Hampshire and started their interstate journey on a river in that State to be transported thence down the river to the State of Maine, and which were detained for a season in New Hampshire by low water were not subject to taxation in New Hampshire at the point of detention since the interstate shipment movement had begun and the delay was entirely due and incidental to the means of transportation.

In *Kelley* v. *Rhoads* (1903), 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359, the court held that a herd of sheep driven at a reasonable rate of speed from a point in Utah, across the State of Wyoming, a distance of about five hundred miles, to a point in Nebraska, for the purpose of shipment by rail from the latter point, is property engaged in interstate commerce to such an extent as to be exempt from taxation by the State of Wyoming under a statute taxing all live stock brought into the State for the purpose of being grazed; and this notwithstanding that the sheep were maintained by grazing along the route, and that the owner could have shipped them to their ultimate destination from a point on the same railroad, which could have been reached from the starting point without entering the State of Wyoming. In the above mentioned case the court held that the

sheep were not subject to taxation in Wyoming because they had not been brought into the State for the purpose of being grazed, but that such grazing was necessary for their sustenance and incidental to their continuous journey through the State. In its decision the court said:

> "The question turns upon the purpose for which the sheep were driven into the State. If for the purpose of being grazed, they are expressly within the first section of the act. But if for the purpose of being driven through the State to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit."

In the case of *Champlain Realty Company* v. *Brattleboro* (1922), 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195, it was held that logs, under control of their owner, which are being floated in a river in continuous movement from one State to another, or which, in the course of their interstate journey, are being temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, are in interstate commerce and not subject to State taxation.

In *Hughes Bros. Timber Co.* v. *Minnesota* (1926), *supra*, certain logs which were driven to booms, there to await the opening of transportation, were not taxable while so awaiting the opening of transportation. In this case the court said:

> "Delays in the continuity of movement were only incidental to the journey and the necessary change in mode of transportation by which the logs were carried from a place in one state to a place agreed upon in another."

In the case of *Carson Petroleum Company* v. *Vial, supra*, the court held that oil purchased at interior points for ex-

port to fill contracts previously made did not lose its character as foreign commerce, and become subject to taxation because after arrival at the port it was temporarily stored there for reasons of expedition and economy preparatory to being loaded on vessels of foreign consignees, it appearing that the delay was incidental to and in aid of transshipment in foreign commerce and therefore did not break the continuity in transit of the commodity.

In contrasting and comparing the two groups of cases which we have hereinbefore discussed the court in the case of *Missouri Pac. R. Co.* v. *Schnipper, supra,* said:

> "In the group of cases in which the right of the state to tax was sustained, it will be observed that the controlling principle is precisely the same as that recognized in the cases in which the right of taxation was denied; that is, that any interruption of the movement of commodities at an intermediate point between origin and final destination that is not incidental to the transportation or the use of the means of transportation, or, being so incidental, is used or extended for purposes of the owner not incidental to the transportation or the means used therefor, breaks the continuity in transit and subjects the shipment to local taxation at the point of interruption. Under such circumstances a shipment is looked upon as being withdrawn from interstate commerce to an extent that its taxation by local authorities does not amount to a regulation or direct burdening of interstate commerce."

The cases of *Eureka Pipe Line Co.* v. *Hallanan* (1921), 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227, and *United Fuel and Gas Co.* v. *Hallanan* (1921), 257 U. S. 277, 66 L. Ed. 234, which are cited and discussed in the decision rendered by the Minnesota Supreme Court in the case at bar as authority for holding that the tax on the cows in the case at bar is invalid do not fall into either of the two groups

of cases which are hereinbefore discussed. In these cases the court declares invalid a State law imposing a tax upon the transportation of oil and gas which flow through pipe lines out of the State on the ground that such oil and gas were subjects of interstate commerce, and that the tax on the transportation of such oil and gas from one State to another was a direct tax on interstate commerce. In neither of these cases does the oil or gas which eventually flows out of the State imposing the tax come to rest in that State during the course of its transportation as do the cattle in the case at bar. As stated by the court in the case of *United Fuel and Gas Co.* v. *Hallanan, supra,* "there is no break, no deliberation, but a steady flow, ending as contemplated from the beginning beyond the state line." Hence, we submit that the Minnesota Supreme Court erred in its contention that these cases support its decision in the case at bar.

We believe that the case at bar clearly falls within the group of cases in which the right to tax at the point of interruption was upheld. We submit that when the cattle in the case at bar came to rest in South St. Paul something more than the mere mechanics of transportation was involved and that this interruption was not a mere incident in their transportation to the ultimate purchaser. The cattle were shipped to the stockyards to be there sold and re-sold. Neither the dealer in the stockyards who was to buy them in the first instance, nor the ultimate buyer were known at the time the original shipment was made (R. 6). After buying the cattle the dealer kept them in pens assigned to him until he sold them to third party purchasers (R. 17). At the time the tax was assessed the dealer owned the cattle and had offered them for sale, but had not yet sold any of them. At the time of the assessment of these cattle this dealer was taking care of these cattle preparatory to selling them and was attempting to sell them. He

was engaged in business with reference to the cattle in the State of Minnesota, and under the protection of its laws. He should pay the State of Minnesota a tax on these cattle for these privileges. True the cattle remained in his possession only a short time after delivery but they, doubtless, represented the average number of cattle which were in his hands at any other time during the course of the year and on which he paid no personal property tax.

POINT B.

(Assignment of Errors 1 and 3.)

The rule laid down by the cases involving the power of the Federal Government over interstate commerce is not applicable to the case at bar, which involves the limit of the State's power over commerce among the States.

The Supreme Court of the State of Minnesota based its decision very largely upon language used in the two cases of *Swift and Co.* v. *United States* (1905), 196 U. S. 375, 49 L. Ed. 518, and *Stafford* v. *Wallace* (1922), 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735. Both of these cases involve the power of the Federal Government over interstate commerce rather than the limit of the State's power over commerce among the States. That there is a distinction between the two types of cases is well brought out in the case of *Bacon* v. *Illinois* (1913), 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, where the court said:

> "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority."

In both the *Swift and Co.* and the *Stafford* v. *Wallace* cases the decisions in the tax cases were urged by the packers as a basis for their contention that the Federal Government should not be permitted to interfere in the stockyards, and this distinction between Federal regulation and State taxation was clearly made by the court. In the former case the court said (at p. 400):

> "But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states,"

and in the latter case, the court said (at p. 525):

> "The other cases relied on by appellants are less relevant to the discussion than the *Anderson* and *Hopkins* cases. Some of them are tax cases. As to them it is well to bear in mind the words of the court in the *Swift* case (p. 400):
>
> " 'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states.'
>
> "Thus, take the case of *Bacon* v. *Illinois*, 227 U. S. 504, Bacon had purchased grain in transit from a western State to the east. He exercised the power under his contract to stop the grain in Illinois and put it in a grain elevator there. He intended to send it on to some other state for sale. He might have changed his mind. He did, however, after a time, send it out of the State. The grain was taxed while it was in Illinois. The question was whether it was immune from taxation because in transit in interstate commerce. * * * It was

held that property in a State which its owner intends to transport to some other state, but which is not in actual transit and in respect to the disposition of which he may change his mind is not in interstate commerce just because of the intention of its owner, and may, therefore, be taxed by the State where it is. The court brought out the distinction between such cases and this in the remark (p. 516):

"'The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'"

From these quotations it is clearly apparent that the United States Supreme Court expressly refused to follow the tax cases in these cases involving the power of the Federal Government over interstate commerce, and explicitly distinguished the two types of cases. It therefore follows that these decisions cannot be used to turn back and change the established rules in the tax cases.

It is true that the court in the *Swift* case went on to say by way of dictum:

"It should be added that the cattle in the stockyards are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365."

But in view of the fact that this statement was only *obiter dictum*, and in view of the further facts that since the decision in the *Swift* case the Supreme Court in analogous situations has directly held that the object sought to be taxed has come to rest sufficiently to be subject to local taxation.

Susquehanna Coal Co. v. *South Amboy* (1913), 228 U. S. 665, 33 Sup. Ct. 712, 57 L. Ed. 1015 (coal).
Bacon v. *Illinois* (1913), 227 U. S. 504 (grain).
General Oil Co. v. *Crain* (1908), 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754 (oil).

it is submitted that this statement can be given very little, if any, weight.

In the case of *Stafford* v. *Wallace* (1922), *supra,* the court merely reaffirms the principles laid down in the case of *Swift & Co.* v. *United States* (1905), *supra.* As appears from the foregoing quotations from the two cases with respect to the distinction between Federal regulation and State taxation, the latter case points out this distinction more clearly than does the former case. The fact that after its decision in the *Swift* case, which was made in 1907, the Supreme Court of United States in the cases of *Susquehanna Coal Co.* v. *South Amboy, supra* (1913), and *Bacon* v. *Illinois* (1913), *supra,* and *General Oil Co.* v. *Crain* (1908), *supra,* not only held to its doctrine relative to the right of a state to tax commodities in interstate commerce which had come to rest for a purpose which was not entirely incident to transportation, but in the *Crain* case seems to have given this doctrine a more liberal interpretation than ever before, clearly demonstrates that the said court in the *Swift* and *Stafford* cases did not intend to abandon or modify this doctrine.

Point C.

(Assignment of Errors 1 and 4.)

Even assuming that the cattle were in interstate commerce at the time of the tax levy, the tax was valid, since it was so indirect as not to amount to a regulation of interstate commerce.

The following rules with reference to the right of the state to tax commodities in interstate commerce are laid down in *Volume I Cooley on Taxation* (4 *Ed.*), *Section* 374:

> "To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial and not merely incidental and fortuitous. A tax is not invalid merely because it affects interstate commerce and impedes the transit of persons and property from one state to another 'just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use of possession of the thing taxed'."

The court in *Swift and Co.* v. *United States, supra,* said:

> "But it may be that the question of taxation does not depend upon whether the articles taxed may or may not be said to be in the course of commerce between the states, but depends on whether the tax so far affects that commerce as to amount to a regulation of it."

Although this is only dictum, it finds support in the case of *U. S. Fidelity, etc., Co.* v. *Kentucky* (1913), 231 U. S. 394, 34 Sup. Ct. 122, 58 L. Ed. 283, where the court, in upholding a privilege tax on conducting certain commercial agencies, said:

> "To warrant interference (by the courts) with the exercise of the taxing power of a State on the ground

that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial."

Even assuming that the cattle in the case at bar were subjects of interstate commerce at the time the tax was imposed, we submit that under the foregoing rules, the said tax was not a direct and substantial burden on interstate commerce and did not amount to a regulation of interstate commerce. In the case of *Stafford* v. *Wallace, supra,* the court makes the following statement relative to the decisions of the court in the cases of *United Fuel and Gas Co.* v. *Hallanan, supra,* and *Eureka Pipe Line Co.* v. *Hallanan, supra:*

> "Moreover, it will be noted that even in the tax cases, where the tax is directed against a commodity in an actual flowing and constant stream out of the state, from which the owner may withdraw part of it for use or sale in the state before it reaches the state border, we have held that a tax on the flow is a burden on interstate commerce which the state may not impose because such flow in interstate commerce is an established course of business."

In one of these cases concerning which the court makes this statement the tax involved was a tax on the flow of the oil, and in the other case the tax involved was a tax on the flow of gas. In the *Eureka Pipe Line Co.* case, the oil was taxed under a statute forbidding engaging in the business of transporting petroleum or gas in pipe lines without the payment of a tax of two cents for each barrel of oil transported. In the *United Fuel Gas Co.* case, gas was taxed under the same statute. Such a tax, it can readily be seen, does amount to a regulation of interstate commerce. If the State of Minnesota should attempt to place a tax on every head of cattle entering or leaving the South St. Paul

stockyards, such a tax, it is submitted, would be somewhat analogous to those involved in the *Eureka Pipe Line Co.* and *United Fuel Gas Co.* cases. *On the other hand, a mere personal property tax such as that involved in the instant case, imposed alike upon all property situate in the State,* can hardly be said to impose a direct and substantial burden upon interstate commerce, and is clearly not analogous to the tax involved in either the *Eureka Pipe Line Co.* or the *United Fuel Gas Co.* case.

Conclusion.

For the reasons which are hereinbefore set forth and under the authorities and legal principles which have been discussed in this brief, we respectfully submit that the decision of the Supreme Court of Minnesota should be reversed.

Respectfully submitted,

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